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No. 84-1063

In the Supreme Court of the United States

OCTOBER TERM, 1984

JACK S. FOSTER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in refusing to reweigh evidence and reassess witness credibility after concluding that there was ample support in the record for the compensation award made by the Claims Court.

2. Whether the court of appeals erred in refusing to take judicial notice of written "declarations of fact" that were not in the record, concerned matters that were not properly subject to judicial notice, and in any event did not support petitioners' claim.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is unreported. The Claims Court's opinion (Pet. App. B1-B62) is reported at 2 Cl. Ct. 426.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 1984. The petition for a writ of certiorari was filed on December 27, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves the compensation due petitioners for their leasehold interest to quarry "riprap" [1] on Tract 83, Vandenberg Air Force Base, California. In 1942, the United States purchased this 876-acre tract from C.M. McClellan, subject to McClellan's reservation of mineral rights to " '[a]ll oil, gas, asphaltum and other hydrocarbon substances and other minerals, including diatomaceous earth, in and under the land hereby conveyed' " (Pet. App. D2). In 1971, McClellan leased to petitioners the right " 'to extract and remove and take from the premises all riprap rock' " (*id.* at D4). The sole source of riprap on Tract 83 is a dolomite deposit of approximately 22.54 acres (*id.* at B4). For their lease, petitioners agreed to pay $300 per year plus a supplemental monthly payment of $.25 per ton of rock removed (*id.* at D4).

Because the United States did not consider riprap to come within McClellan's reservation of "other minerals," it did not allow petitioners access to Tract 83. Petitioners then filed a complaint in the former Court of Claims under the Tucker Act, 28 U.S.C. 1346(a), seeking compensation for a taking of their riprap interest. Although petitioners, subsequently to obtaining the riprap lease, had purchased all of McClellan's mineral interests in Tract 83 for only $5,000 (Pet. App. B2), they sought $4,293,500 plus interest as compensation for the alleged taking of their riprap rights (*id.* at B4).

During a 10-day trial in 1977, petitioners sought to support their compensation claim with projections that they

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[1]The Court of Claims has noted (*Foster* v. *United States*, 607 F.2d 943, 946 n.4 (1979)) that riprap "consists of heavy, irregular rock chunks which are used chiefly for river and harbor work, such as spillways at dams, shore protection, docks, and other similar construction that must resist the force of waves, tides, or strong currents, and is also used to fill in roadways and or embankments."

could compete profitably with other quarries to supply riprap for various construction projects in central California (Pet. App. B17). Although no riprap had ever been sold commercially from Tract 83, petitioners alleged that they already had a contract with the Green Construction Company (Green) to deliver riprap for the Rincon highway project 75 miles away and hypothesized that they might have been able to obtain contracts for other construction projects. In contrast, the United States introduced evidence from several expert witnesses emphasizing the competitive disadvantages of Tract 83 riprap with stone already available from other quarries and placing the value of petitioners' lease at between $18,560 and $40,000 (*id.* at B28, B4, B26). The trial judge found that there had been a "temporary" taking and recommended compensation of $23,250 (*id.* at B2). On appeal, the Court of Claims remanded the compensation issue on the ground that the government's taking was more properly characterized as "permanent" (*id.* at D15).

2. On remand, a second 10-day trial on compensation was held in 1981 in the newly constituted Claims Court. During this trial, petitioners no longer relied on anticipated profits from potential contracts but instead depended on the more generalized "capitalization-of-income" calculations of their expert, Robert Paschall, to support a compensation claim for $4,200,032 (Pet. 5-6). Paschall based his appraisal on statewide data for rock production between 1967 and 1971, from which he projected riprap demand for 25 years in the areas near Tract 83 (Pet. App. B55). In contrast to Paschall's figures, the United States relied on income-capitalization and comparable-sales appraisals that valued petitioners' leasehold interest at between $27,000 and $50,000 (*id.* at B38). On the basis of the entire record of both trials, the Claims Court concluded that the petitioners were entitled to $28,000, plus interest, as just compensation (*id.* at B61-B62).

3. Petitioners appealed to the United States Court of Appeals for the Federal Circuit and argued, first, that the Claims Court erred in weighing the testimony of certain expert witnesses and, second, that the Claims Court erred as a matter of law in rejecting the income-capitalization method of valuation that had been used by their expert, Paschall. Petitioners also sought to have the court of appeals take judicial notice of dozens of pages of material not in the record. This material consisted of five post-trial "declarations of facts" and included the declaration of Eldon H. Haskell, a general contractor in California, that he had been told by Glen McAfee, a project supervisor for the Green Construction Company, that Green and one of the petitioners had made an oral contract for 50,000 tons of riprap at $4.00 per ton for the Rincon highway project (Pet. App. H10-H13).

The court of appeals denied petitioners' motion to take judicial notice of the five declarations of fact.[2] Subsequently, based on the full record in the trial court, the court of appeals affirmed (Pet. App. A1-A5) and held that the Claims Court did not erroneously evaluate the evidence and did not flatly reject petitioners income-capitalization method of valuation (*id.* at A2-A4).[3]

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of

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[2]A copy of this order is reproduced as an appendix to this brief (see page 1a, *infra*).

[3]Petitioners also appealed the decision of the Claims Court to disallow $28,457.47 in attorneys' fees that they had sought under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4654(c). The court of appeals affirmed the Claims Court on this matter, and petitioners do not seek certiorari on this aspect of the court of appeals' decision.

appeals, and presents only fact-bound questions that do not warrant further review.

1. While vigorously contending that the court of appeals should have taken judicial notice of their evidence of a construction contract with Green (Pet. 7-12), petitioners overlook the fact that such a contract would not support their claim that they were due compensation in the vastly exaggerated amount of $4,200,032. As the Claims Court held (Pet. App. B40), the proper measure of just compensation is the fair market value of petitioners' interest, *i.e.*, what a willing buyer would pay for that interest to a willing seller. See *United States* v. *Miller*, 317 U.S. 369, 374 (1943). Petitioners cannot contest the conclusion of the Claims Court, following the well-established doctrine of this Court, that "[a]s a general rule, there is no compensation for frustrated contracts or for loss of future income. The sovereign must pay only for what it takes, not for opportunities the owner loses." Pet. App. B39; see also *United States* v. *General Motors Corp.*, 323 U.S. 373, 379 (1945); *United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 381-382 (1943).

Although the Claims Court allowed petitioners to prove the present value of their leasehold interest in light of construction contracts that they might have been awarded (see Pet. App. B17), petitioners omit any mention of the evidence suggesting that no willing, informed buyer would have paid more for petitioners' interests than the Claims Court awarded as just compensation.

For example, petitioners do not mention the considerable uncertainty, even among their own experts, regarding the amount of available riprap on Tract 83. In 1974, petitioners insisted that there existed a " 'probable extractable deposit of 25,000,000 tons' " (C.A. App. 122). However, at the first valuation trial, petitioners' own experts conceded

that there existed only between 8.3 and 12.5 million tons (Pet. App. B47). At the second valuation trial, petitioners' new expert, Paschall, found it necessary to discount even these "optimistic" estimates (Tr. 279, 281, 285), and to reduce the estimated riprap tonnage to just over 3 million tons (Pet. App. B48). The Claims Court ultimately concluded that there probably existed no more than 1.5 to 2 million tons of extractable riprap (*ibid.*), a conclusion that the petitioners do not contest.

Petitioners also omit any mention of an event that the Claims Court found to be particularly significant—the "Missile City" fiasco. The Missile City Corporation was formed in 1959 to develop a quarry for producing concrete aggregate from a dolomite deposit located only 10 miles from Tract 83 (Pet. App. B48). The Missile City principals constructed a $1 million dollar processing plant, based on expert opinion that there existed a "mountain" of dolomite with reserves of approximately 600,000,000 tons (*ibid.*). After three years, however, the "mountain" of dolomite had been exhausted after only 1.5 million tons of material had been removed, and the Missile City Corporation was forced to terminate its operations with total losses in the neighborhood of $3 million (*ibid.*). The Claims Court found (*id.* at B48-B49) that the Missile City experience "hovers as a specter over projected Tract 83 operations" and would affect the price that any informed buyer would be willing to pay for petitioners' interests in the uncertain dolomite deposit of nearby Tract 83.

Finally, the petition does not mention other evidence that supports the Claims Court's award of $28,000 as just compensation. In particular, the petition does not discuss the expert opinion of William R. Merrill that petitioners' interests were worth only $18,560 (Pet. App. B26) or the testimony of another expert, C. William McClung, that their

interests were worth only $27,000 (*id.* at B36-B38). Petitioners' failure to contest McClung's valuation is particularly telling in light of the court of appeals' reliance on it in affirming the reasonableness of the Claims Court's award (*id.* at A3).

In short, petitioners make no objection to considerable evidence that fully supports the decision of the courts below. For this reason alone, no further review is warranted by this Court.

2. Petitioners' primary contention (Pet. 7-12) appears to be that the court of appeals abused its discretion in refusing to base its decision on materials outside the record. Specifically, petitioners argue that the court of appeals should have taken judicial notice of Eldon Haskell's post-trial hearsay declaration that he had been told of an oral contract between petitioners and the Green Construction Company regarding the sale of riprap at $4 per ton for the Rincon highway project. Petitioners argument has no merit. The Haskell declaration adds nothing to their case, and in any event the court of appeals was entirely correct in refusing to take judicial notice of it.

Petitioners are simply incorrect in arguing (Pet. 8-9) that their putative contract with Green makes the Claims Court award unjust. The significance that petitioners would now read into the Green contract flatly contradicts this Court's principle that just compensation does not include damages for lost profits from frustrated contracts (see, *e.g., United States ex rel. TVA* v. *Powelson,* 319 U.S. at 291-293; *Omnia Co.* v. *United States*, 261 U.S. 502, 513 (1923)) and also conflicts squarely with the testimony of petitioners' own experts. During the second trial, for example, petitioners' chief witness, Paschall, stated unequivocably (Pet. App. B56) that proper valuation of petitioners' interests could not depend on " 'fruitless arguments over the possible

contribution of this project and that project to the viability of a given rock and aggregate operation.' " Even more damaging to petitioners' case is the testimony of their witness, Charles McVay, in the first trial regarding the costs to the petitioners of providing riprap for the Rincon project. According to McVay (Pet. App. B20), a contract for the Rincon project would have cost petitioners $4.50 per ton: $3.00 per ton for transportation costs and $1.50 per ton for processing. As the trial court concluded (C.A. App. 101) "[o]n the basis of McVay's costs, the Rincon project contract with Green Construction *would have produced a loss at the $4.00 selling price*" (emphasis added). Thus petitioners are now complaining that they were not allowed to prove that they had in fact made a losing contract with Green.

In any event, whatever the probative value of the Haskell declaration, the court of appeals properly rejected it as inappropriate for judicial notice. To be judically noticeable under Fed. R. Evid. 201, a fact must be both relevant and " 'not subject to reasonable dispute.' " C. Wright & K. Graham, *Federal Practice and Procedure* § 5104, at 483-484 (1977). Here, the hearsay declaration of Eldon Haskell is far different from the type of objective, universally accepted information that may properly be judicially noticed. See, *e.g., Oliver* v. *Hallett Construction Co.*, 421 F.2d 365, 367 (8th Cir. 1970) (judicial notice taken that sundown at Little Rock, Arkansas, on October 7, 1966, was at 5:45 p.m.). Instead, the Haskell declaration is no more verifiable than the unauthenticated "minutes of meetings" properly rejected as unsuited for judicial notice in *Melong* v. *Micronesia Claims Commission*, 643 F.2d 10, 12 & n.5 (D.C. Cir. 1980). As the court of appeals correctly stated in *Melong* (643 F.2d at 12 n.5): [4]

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[4]The present case, in which petitioners seek judicial notice of disputed facts, is readily distinguishable from the cases cited by petitioners (Pet. 9

> Judicial notice was never intended to permit such a widespread introduction of substantive evidence at the appellate level * * *. [Fed. R. Evid. 201(b)(2)] is designed to permit judicial recognition of material such as scientific data or historical fact that, although outside the common knowledge of the community, is nevertheless ascertainable with certainty without resort to cumbersome methods of proof.

Here, if petitioners truly possessed post-trial, newly discovered evidence worthy of a new trial, their proper course of action was to file a motion with the trial court pursuant to Rule 60(b)(2) of the Rules of Procedure of the Claims Court. Cf. *United States* v. *Walus*, 616 F.2d 283, 287-288 (7th Cir. 1980). Petitioners may not simply assert (Pet. 10) that such a motion would have been "useless" because the trial court appeared to them to be "clearly disposed" against it.

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n.8) in which courts have referred to legislative facts found in publicly disseminated books or journals. See, *e.g.*, *Brown* v. *Board of Education*, 347 U.S. 483, 489 n.4 (1954) (referring to books discussing the history of public education prior to the adoption of the Fourteenth Amendment); *Parker* v. *Brown*, 317 U.S. 341, 363 n.9 (1943) (referring to scholarly papers discussing the economics of the grape industry).

Petitioners mistakenly rely (Pet. 10 n.11) on *West Virginia Dep't of Highways* v. *Brumfield*, 295 S.E.2d 917 (1982). In that case, the Supreme Court of Appeals of West Virginia considered whether the trial court abused its discretion in denying plaintiffs' motion for a new trial based on newly discovered evidence—precisely the motion that the petitioners in the present case refused to file.

Petitioners also incorrectly rely (Pet. 11) on *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc.* v. *Anderson*, 390 U.S. 414 (1968). In that case, this Court never discussed the question of judicial notice but merely held that the trial judge improperly excluded evidence of a debtor's future earnings and remanded for a new trial. In contrast, the trial court in the present case freely allowed petitioners to introduce evidence of their contract with Green—precisely the contested fact that the petitioners improperly sought to establish by judicial notice in the court of appeals.

Petitioners also may not circumvent their responsibility to present post-trial evidence to the trial court by appending to their petition (Pet. App. H1-H9) the affidavit of Robert Chapman, one of the government's witnesses during the 1977 trial, stating (*id.* at H7) that in Chapman's view the award of compensation should have reflected petitioners' alleged contract with Green. Chapman's affidavit was apparently obtained by petitioners solely to prove the existence of their contract with Green. Nothing in the affidavit contradicts the testimony of petitioners' own witness, McVay, indicating that the Green contract would have been unprofitable. Nor, of course, can the affidavit displace the rule that no compensation is due merely for frustrated contracts (see page 5, *supra*).

3. The remainder of petitioners' arguments are insubstantial. Petitioners maintain (Pet. 12-13) that the trial court placed too much weight on Chapman's 1977 valuation testimony on behalf of the United States. Petitioners' attack on Chapman's credibility is in considerable tension with petitioners' own reliance (Pet. 8) on Chapman's 1984 affidavit. In any event, petitioners contest neither the court of appeals' holding (Pet. App. A2) that the assessment of witness credibility is peculiarly within the province of the trial court, nor the court of appeals' conclusion (*id.* at A3) that the Claims Court's $28,000 judgment was fully consistent with considerable evidence apart from Chapman's testimony.

Petitioners err in contending (Pet. 13-15) that the Claims Court failed to value their expectation of renewing their lease for the full 25-year life of the Tract 83 deposit. The Claims Court clearly calculated the value of petitioners' interests based on the estimated 25-year life of the Tract 83 deposit (Pet. App. B12, B24, B48, B53-B55, B58, B60).

Finally, the petitioners assert (Pet. 15-19) that the Claims Court refused to allow the capitalization-of-income approach used by their expert, Paschall. This assertion too is incorrect. As the court of appeals observed (Pet. App. A4), the Claims Court not only "thoroughly considered" Paschall's calculations but also relied on the testimony of several government witnesses who valued petitioners' interests using a capitalization-of-income approach (but arrived at substantially smaller valuations than Paschall). Accordingly, petitioners' argument is nothing more than insistence that only Paschall should be believed. But petitioners do not assert error in the conclusions of the courts below that Paschall's calculations improperly applied statewide statistics to determine local market demand (Pet. App. A3, B57), that Paschall made arbitrary personal "assessments" of the abilities of other quarries to compete (*id.* at B59), that Paschall underestimated the costs of petitioners' capital expenditures (*id.* at B59-B60), and that Paschall arbitrarily selected and applied various discount factors (*id.* at B60).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1985

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APPENDIX

UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
717 MADISON PLACE, N.W.
WASHINGTON, D.C. 20439

MARCH 8, 1984

GEORGE E. HUTCHINSON
CKERK

TELEPHONE: 633-6550
AREA CODE 202

Mr. Charles W. Willey
812 Presidio Avenue
Santa Barbara, California 93101

RE: Jack S. Foster, Patricia Foster, James H. Mosby and Virginia E. Mosby v. The United States Appeal No. 84-724

Dear Mr. Willey:

The Court has today denied appellants' motion to take judicial notice of post-trial adjudicative facts presented by five declarations supporting modification of the lower court determination of damages.

Very truly yours,

cc: Donald T. Hornstein, Esq.

GEH: bam